IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 755 OF 2006

Parvez Mohammed Hussain Ghaswala
and another. ... Appellants.

V/s.

Smt.Rais Fatma Dost Mohammed
Quershi and another. ... Respondents.

P.K.Dhakephalkar, senior counsel with Amol Mhatre
i/b. Zohair & Co. for the appellants.

A.Y.Sakhare, senior counsel with Yashodhan
i/b. B.R.Dalal for respondent No.1.

Mrs.Geeta Joglekar with Mr.Malankar
for respondent No.2.

CORAM: A.M.KHANWILKAR, J.

DATED: 18th January 2007.

P.C.:

. Heard counsel for the parties.

2. Admit.

3. Mr.B.R.Dalal waives service for respondent No.1. Mrs.Joglekar waives service for the Municipal Corporation.

4. Since a short question is involved in this appeal, appeal is taken up for hearing forthwith by consent.

5. This appeal is directed against the judgment and order passed by the Bombay City Civil Court, Bombay dated 11th August 2006 in Notice of Motion No.793/2003, whereby the said notice of motion filed by respondent No.1- plaintiff was made absolute with further direction to the officers of respondent No.2- Corporation not to demolish the wall on the strength of the suit notices dated 23rd January 2003 and 6th March 2003. Similarly, the appellants were directed not to demolish the suit wall till the disposal of the suit.

6. The appellants- original defendant Nos.2 and 3 are the landlords who have taken exception to the order of injunction issued against them by the trial Court. According to the appellants, the trial Court having rightly noted that the jurisdiction of the civil court was barred having regard to the subject matter of the suit, ought not to have entertained the suit muchless granted any interim relief in favour of respondent No.1- plaintiff.

7. The trial Court proceeded to entertain the suit on the specious reason that the challenge to the suit notice, set up by respondent No.1- plaintiff in the suit, was founded on the assertion of malafide action of the officers of the Corporation for which reason the suit was

maintainable and can be proceeded with. The general observation made by the trial Court that if allegation of malafide is made out in the suit, in spite of statutory bar of civil court to proceed with the subject matter, such a suit would be within the framework of section 9 of Code of Civil Procedure, 1908. However, the observation so made by the trial Court in the present case is misplaced. For, no officer of the Corporation has been impleaded as defendant in the suit nor there is any allegation of malafide against any specific officer, in the plaint as filed. It is well established position that allegation of malafide can be looked into only if the person, against whom such allegation is made, has been impleaded as party-respondent to the proceedings and not otherwise. Similarly, the case of malafide cannot be entertained against the Corporation as a whole but will have to be specific against some official(s) of the Corporation who has/have taken impugned action with purpose. Indubitably, the respondent No.1- plaintiff has not challenged the finding of the trial Court that ordinarily the jurisdiction of the civil Court is barred in respect of the proposed action. On this reasoning, this appeal ought to succeed. The impugned decisions will, therefore, have to be set aside and the Notice of Motion No.793/2003 to stand dismissed.

Consequently, ad-interim orders passed in the said notice of motion, which have been confirmed by the impugned order, will stand terminated.

8. Counsel for respondent No., however, submits that it is open to respondent No.1- plaintiff to carry out necessary amendment in the plaint, if so advised; or to resort to appropriate substantive proceeding to challenge the impugned action of the Corporation. To enable the respondent No.1- plaintiff to take recourse to such other remedy, respondent No.1- plaintiff will have to be protected for some time, as the interim protection in favour of the plaintiff has been, admittedly, operating since 24th February 2003. In the interest of justice, therefore, it is ordered that the parties shall observe status-quo with regard to the suit property for a period of four weeks from today to enable respondent No.1- plaintiff to take recourse to such other remedy as may be permissible by law which have to be decided on its own merits in accordance with law.

9. Appeal stands disposed of on the above terms with no order as to costs.

(A.M.KHANWILKAR, J.)